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Twenty-ninth session

SUMMARY RECORD OF THE 583rd MEETING

Held at Headquarters, New York,
on Tuesday, 28 May 1996, at 10.30 a.m.

Temporary Chairman: Mr. CORELL
(Under-Secretary-General,
The Legal Counsel)

Chairman: Mrs. PIAGGI de VANOSSI (Argentina)

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The meeting was called to order at 11 a.m.

OPENING OF THE SESSION

1. The TEMPORARY CHAIRMAN said that the decision to move the International Trade Law Branch from New York to Vienna in 1979 had demonstrated a lack of managerial understanding. While an expert group had conducted an efficiency review and had suggested that the Branch should be moved back to Headquarters, the cost benefit of relocation was not likely to generate any savings in the short term. After discussing the matter with the Under-Secretary-General for Administration and Management, he had come to the conclusion that a move was currently not realistic and that the mistake made in 1979 would be difficult to correct.

2. Since its establishment in 1966, the United Nations Commission on International Trade Law (UNCITRAL) had distinguished itself by a remarkable record of achievements that clearly justified its place not only as the core legal body of the United Nations concerned with international trade law but also as the leading body in the codification and harmonization of international trade law in general. The extensive work that the Commission and its secretariat put into the preparation of legal texts was complemented by the training and technical assistance programme carried out by the secretariat. That programme, which benefited developing countries and countries with economies in transition, included information activities aimed at promoting knowledge of international commercial law conventions, model laws and other legal texts, as well as technical assistance to Member States in their efforts to reform their commercial law and adopt UNCITRAL texts.

3. Governments, national and international business communities and multilateral and bilateral assistance agencies were attaching increasing importance to improving the legal framework for international trade and investment. In that regard, it was crucial to ensure adequate coordination with multilateral and bilateral agencies providing assistance in commercial law reform in order to avoid situations in which such assistance led to the adoption of national laws that did not represent internationally agreed standards, including conventions and model laws adopted by the Commission.

4. The UNCITRAL secretariat was committed to achieving greater coordination with multilateral funding agencies, such as those within the United Nations system. Member States should work closely with the Commission's secretariat in order to ensure that the conventions and model laws formulated by UNCITRAL were given due regard in that process. He invited all donors to contribute to the technical assistance activities of the secretariat by making voluntary contributions to the Trust Fund for UNCITRAL Symposia.

5. The United Nations had begun its fifty-first year of existence under the shadow of an unprecedented financial crisis caused by the non-payment of assessed contributions. The General Assembly's decision to adopt a zero-growth budget would have an impact on all major and subsidiary organs, and he anticipated a reduction in the capacity to service meetings, which included limitations on the availability of documents and translation services. He was,

however, confident that the UNCITRAL secretariat would nevertheless be able to maintain in the years to come the high quality of the services that it provided to the Commission.

6. Drawing attention to the main topics to be discussed at the current session, he said that the first draft of the draft Notes on Organizing Arbitral Proceedings had been considered at a number of conferences on arbitration, including the International Arbitration Congress, which had been organized by the International Council for Commercial Arbitration and held in Vienna in November 1994. At its twenty-eighth session, the Commission had adopted a number of specific decisions regarding the draft Notes. Those decisions had been incorporated into the draft, and he hoped they would enable the Commission to finalize the text at its current session.

7. In 1995, the Commission had adopted articles 1 and 3 to 11 of the draft Model Law on Legal Aspects of Electronic Data Interchange (EDI) and Related Means of Communication. At its current session, the Commission had to complete its review and adoption of draft articles 2 and 12 to 14. The Commission was also expected to consider and adopt a guide to enactment to assist national legislators in their implementation of the Model Law. Even in its draft form, the text of the Model Law was being used as a basis for model communication agreements between users of electronic means of communication. The draft was also being taken into account by States revising their national legislation to adapt it to the needs of electronic commerce.

8. The Commission would also have the opportunity to review and adopt provisions prepared by the Working Group on Electronic Data Interchange for addition to the Model Law in order to deal with the replacement of traditional transport documents, such as maritime bills of lading, by electronic data messages.

9. In addition to the draft texts before it, the Commission would also consider reports concerning possible forms of work on build-operate-transfer (BOT) projects and the progress achieved by the working groups assigned to receivables financing and cross-border insolvency, as well as training and technical assistance.

ELECTION OF OFFICERS

10. Mr. ABASCAL (Mexico) nominated Mrs. Piaggi de Vanossi (Argentina) for the office of Chairman.

11. Mr. GRIFFITH (Australia) seconded the nomination.

12. Mrs. Piaggi de Vanossi (Argentina) was elected Chairman by acclamation.

13. Mrs. Piaggi de Vanossi (Argentina) took the Chair.

ADOPTION OF THE AGENDA

14. The agenda was adopted.

15. Mr. HERRMANN (Secretary of the Commission) drew attention to General Assembly resolution 50/206 A, which dealt with the more efficient utilization of conference-servicing resources.

INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT NOTES ON ORGANIZING ARBITRAL PROCEEDINGS (A/CN.9/423)

16. Mr. SEKOLEC (International Trade Law Branch), introducing the draft Notes on Organizing Arbitral Proceedings (A/CN.9/423), said that the Notes reflected a discussion of the draft Guidelines for Preparatory Conferences in Arbitral Proceedings (A/CN.9/396/Add.1) in which four principles had been highlighted: first, the text should not impinge on the beneficial flexibility of arbitral proceedings; second, the establishment of any requirements beyond existing laws, rules or practices must be avoided; third, disregarding the Notes in arbitral proceedings should not lead to the conclusion that procedural principles had been violated; and fourth, unlike other legal texts, the Notes should not aim at harmonizing procedures but rather serve as a management and planning tool for practitioners.

17. In addition to the UNCITRAL debates, the Guidelines had been discussed in a number of other international forums, including the XIIth International Arbitration Congress, held in Vienna in November 1994 by the International Council for Commercial Arbitration. The Notes retained the basic structure of the Guidelines but included specific revisions suggested by both the Commission and other international forums.

18. Mr. HOLTZMANN (United States of America) expressed appreciation to the Secretariat for successfully incorporating the suggestions made at the Commission's previous session into the revised draft Notes.

19. Mr. GRIFFITH (Australia), Mr. ABASCAL (Mexico), Mr. GOH (Singapore), Mr. LEBEDEV (Russian Federation) and Mr. HUNTER (United Kingdom) proposed that, since the draft Notes had been so carefully prepared, they might be considered section by section rather than paragraph by paragraph.

20. Mr. ZHANG Yuqing (China) and Mr. CHOUKRI (Observer for Morocco) said they would prefer a paragraph-by-paragraph discussion.

21. Mr. TELL (France), Mr. RAO (India) and Mrs. FERNANDEZ de GURMENDI (Argentina) expressed their preference for a section-by-section approach, provided that there would be an opportunity to comment on all provisions of the draft Notes.

22. The CHAIRMAN said that the Commission would consider the Notes section by section but would examine specific paragraphs when necessary.

Paragraph 1

23. Paragraph 1 was adopted.

Paragraphs 2 and 3

24. Mr. ZHANG Yuqing (China) noted that the draft Notes dealt with norms of arbitral proceedings rather than practical laws and were non-binding. The fact that they could be disregarded - and that all the time and effort invested in them would be for naught - was particularly regrettable during a period of financial constraint. Perhaps the draft Notes should become a supplement to the UNCITRAL Arbitration Rules.

25. Mr. ABASCAL (Mexico), Mr. LEBEDEV (Russian Federation), Mr. HUNTER (United Kingdom), Mr. RAO (INDIA), and Mrs. FERNANDEZ de GURMENDI (Argentina) expressed the hope that publication of the draft Notes would not be deferred, so that the international community could begin to make use of them.

26. Mr. LEBEDEV (Russian Federation) stressed the non-binding nature of the recommendations contained in the draft Notes, and said that their usefulness lay in illustrating the practical issues that could arise in the context of international commercial arbitration, and in providing general guidelines for both arbitrators and the parties participating in arbitral proceedings. He found the Chinese proposal to impart some binding nature to the Notes to be interesting but not easily implementable, because arbitrational approaches differed from country to country and even among individual arbitrators.

27. Mr. RAO (India) said that although the Notes were intrinsically non-binding in nature, their utility lay in the way in which they could be applied by arbitrators on a case-by-case basis.

28. Mr. FERRARI (Italy) said that paragraph 2 of the draft Notes, established their non-binding nature and paragraph 3 stated that they were not suitable to be used as arbitration rules. His delegation therefore suggested that the guidelines in the draft should be referred to not as "rules" but as "suggestions".

29. Mr. CHOUKRI (Observer for Morocco) said that, in view of the non-binding nature of the Notes as specified in paragraph 2, the question arose as to whether courts or arbitrators were bound to accept the guidelines contained therein if the parties concerned had previously agreed to be bound by them.

30. Mr. SEKOLEC (International Trade Law Branch), said that even if the parties agreed on the applicability of the Notes, such an agreement did not establish any obligation binding upon an arbitral tribunal.

31. Mr. ABASCAL (Mexico) suggested that the character of the Notes could be made clearer if paragraph 3, which specified that the Notes were not suitable for use as arbitration rules, were to precede paragraph 2.

32. Mr. ZHANG Yuqing (China) said that given the non-binding nature of the Notes, the question arose as to whether they had any independent status at all. The Notes might more accurately be referred to as "suggestions" or "advice".

33. The CHAIRMAN said that she took it that a consensus existed concerning the need to complete the draft Notes at the current session, but not concerning the

suggestion of the Chinese delegation regarding a change in the title of the document.

34. Paragraphs 2 and 3 were adopted.

Paragraphs 4 and 5

35. Mr. HUNTER (United Kingdom) said that the words "arbitration rules" in the first sentence of paragraph 4 could appear to refer only to institutional rules or published sets of rules, such as the UNCITRAL Arbitration Rules, whereas the paragraph was really intended to encompass any rules agreed upon by the parties to arbitration proceedings. He proposed that those words should be replaced by the phrase "rules governing the proceedings (whether institutional or otherwise)".

36. Mr. TELL (France) said that the reference to "the law" in the first sentence of paragraph 4 should be clarified, since the rules chosen by the parties to arbitration proceedings were subject only to the mandatory rules of procedural law. He proposed that the beginning of the sentence should be amended to read, "Subject to the mandatory provisions of any laws governing the arbitral procedure".

37. Mr. HOLTZMANN (United States of America) proposed that the beginning of paragraph 4 should be changed to read, "Subject to the provisions of the law governing the arbitral procedure from which the parties cannot derogate", so that it would be consistent with the wording of article 1, paragraph 2, of the UNCITRAL Arbitration Rules. He also proposed that the phrase "including fundamental requirements of procedural justice" should be deleted, since it was unnecessary and could cause problems by giving rise to a number of different interpretations. He supported the proposal of the United Kingdom representative, but suggested that the word "arbitration" should be inserted before the word "rules".

38. Mr. ABASCAL (Mexico) said he agreed that the words "including fundamental requirements of procedural justice" should be deleted. However, he was concerned that the French proposal could mislead users of the Notes by implying that non-mandatory provisions were never applied to arbitral procedure.

39. Mr. HERRMANN (Secretary of the Commission) suggested that the first part of the first sentence of paragraph 4, preceding the words "typically allow", should be replaced by the words "Laws governing the arbitral procedure and arbitration rules that the parties may agree upon", since the paragraph was intended only to emphasize the flexibility allowed in the conduct of arbitral proceedings, not the legal provisions governing such proceedings.

40. Mr. LEBEDEV (Russian Federation) and Mr. ABASCAL (Mexico) said they supported the Secretary's suggestion.

41. Mr. CHOUKRI (Observer for Morocco) said that he supported the United States proposal to delete the reference to "fundamental requirements of procedural justice", and suggested that those words should be replaced by the phrase

"including the requirements that are most appropriate to the subject of the dispute".

42. Mr. HOLTZMANN (United States of America), supported by Mr. HUNTER (United Kingdom), said that he welcomed the Secretary's proposal and withdrew his own previous proposal.

43. The CHAIRMAN said that, if she heard no objection, she would take it that the Commission adopted the Secretary's suggestion.

44. Paragraphs 4 and 5 as amended, were adopted.

The meeting rose at 1 p.m.